

OGC 79-10578
26 November 1979

MEMORANDUM FOR: Director of Personnel

FROM: Daniel B. Silver
General Counsel

SUBJECT: OGC Comments on the NAPA Project Group
Report

1. Outlined below are comments from this Office regarding the subject report. The comments are organized to correspond to the Tabs of the report.

TAB A -- SCOPE AND LIMITATIONS
OF THE DCI'S AUTHORITY

Project Group
Recommendation A

Charge the General Counsel to complete the Guide to Law of Central Intelligence Agency within three months, and subsequently to keep it current.

OGC Comments:

Throughout the Project Group's discussion, conclusion and recommendation there seems to be confusion as to the purpose of this Office's Guide to Law of Central Intelligence Agency. First, its purpose is broader than that related to the NAPA comments and recommendation. The NAPA comments focused on the scope of CIA's statutory authority in personnel matters. It is clearly the purpose of the Guide to cover statutory subject matter that is broader in scope than this.

More importantly, the Guide was never intended to fill the purpose which is suggested here and cannot readily be adapted to do so. The original purpose of the Guide was as an unclassified general desk reference for Agency lawyers, containing the principal or landmark authorities pertaining to the Agency.

Much of the guidance upon which senior Agency managers should be relying is classified and thus does not lend itself to inclusion in the Guide. Examples are Presidential Directives, some Attorney General procedures, and the Agency's Headquarters Regulations.

Sheer volume is yet another consideration. Judicial decisions alone which reflect upon Agency authority and responsibility would run to many hundreds of pages.

Conclusion With Respect
to Recommendation A

The DCI should reject Recommendation A.

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Project Group
Recommendation B

Require senior managers periodically to read the Guide.

OGC Comment:

There is nothing wrong with requiring senior Agency managers to read the Guide periodically unless in doing so they form the belief that they will thereby be exposed to all relevant regulatory material applicable to their responsibilities. Clearly, this is not the case.

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Project Group
Recommendation C

Charge the General Counsel with developing a statement, in the style and detail associated with a law review article, that cites the significant boundaries of the DCI's authority with regard to personnel administration. This statement should be completed by 1 January 1980. The statement is not in lieu of the Guide; its purpose is to provide a single, uniform interpretation of the boundaries of the DCI's authority, avoiding the problem of differing conclusions drawn by laymen readers.

OGC Comment:

OGC currently is preparing a memorandum of law regarding the scope of the Director's Section 8 spending authorities. Certainly, a large portion of this memo will be devoted to expenditures related to personnel. While there is no doubt that such a guidance paper will and should be prepared by this Office, the variations which exist in each episode of personnel administration make it absolutely unlikely that a guidance paper can be written which anticipates every contingency which will be encountered by Agency managers engaged in personnel administration.

TAB B -- CRITERIA FOR CHANGES

Project Group
Recommendations

The NAPA Report recommends that the Agency establish a framework for its system, including a written set of considerations for use in determining whether or not to adopt changes which stem from systems in other agencies. The Project Group believed that the Agency should maintain its freedom to select those parts of the system which would allow us the greatest flexibility in improving our personnel management system and therefore recommended that:

- (1) The Agency not adopt the NAPA proposal for a written set of considerations;
- (2) The DDCI task the DOP with the responsibility to analyze proposed personnel policy changes; and,
- (3) DDCI utilize the DOP analysis as the basis for his decision and as a source of information for employees concerning the policy change or lack of it.

OGC Comments:

The Project Group, in my opinion, missed the mark on this issue. The NAPA Team was concerned about two aspects of this problem, (1) the absence of any formalized analytical process, and (2) the apparent absence, in one location, of any written set of considerations to be applied in such a review. Adoption of these recommendations will not necessarily decrease Agency flexibility. Indeed, in some cases, flexibility may be increased by eliminating unwritten policy barriers or inertia which settles in an agency personnel management system. In defense of the Project Group, it should be noted that the development of a set of written considerations is easier said than done. Further, it is likely that the final product will be so general in nature so as to be of little practical value. Procedurally, the Agency's regulatory coordination and pre-coordination process, perhaps slightly modified, should suffice as the analytical procedure desired by the NAPA Team.

Finally, it is my opinion that neither the NAPA Team nor the Project Group fully recognized the complexity of the problems in this area. The determination of whether the Agency may utilize personnel practices of other agencies will be, in the final analysis, based upon an interpretation of our own statute as it relates to other laws. While it is possible to develop a procedural framework to be used in determining whether a particular personnel practice should be adopted, one must first conclude that it is legally possible to do so.

TAB C -- PERSONNEL POLICY:
APPROVAL AND PUBLICATION OF REGULATIONS

Project Group
Recommendation A

STATINTL

STATINTL

Have the Director of Personnel review the [REDACTED] series and where necessary revise them in format to clearly indicate the basic Agency policy on the subject contained in that sub-series. This revision is to be completed within six months. As this is a format change only, coordination is not necessary. The revised regulation is to note "revised for format only," with the last date of content change also indicated. Only those [REDACTED] sub-series reflecting policy issues need be revised. Those sub-series programmed for content change within six months after the completion of the format revision can be revised for format when revised for content.

OGC Comment:

STATINTL

I agree with the sense of the recommendation but believe it is necessary that this effort be coordinated with the Office of General Counsel. As a matter of present policy, [REDACTED] requires that I or my designee review all Agency regulatory materials and proposals, in whatever form, for their legality. Experience has shown that this procedure is worthwhile. Absent legal review, even the most superficial change can result in a directive which is legally deficient.

Project Group
Recommendation B

The DCI or the DDCI continue to approve all new personnel policies or any changes in existing policies; the Director of Personnel continue developing personnel regulations; and, the DDA, following coordination with appropriate senior Agency managers, issue all Headquarters Personnel Regulations unless statute requires DCI or DDCI approval.

OGC Comment:

None

TAB D -- AUTHORITIES OF
THE DIRECTOR OF PERSONNEL

Project Group
Recommendation

The DDCI issue a memorandum to senior Agency management in which the control and enforcement functions to be performed by the Director of Personnel are delineated. This memorandum should also outline reporting requirements and procedures for resolving disputes.

OGC Comment:

I support the recommended option, of the two presented. However, it should not be necessary for the DDCI to issue an instruction in memorandum form in order that it have force. It should be perfectly adequate that the instruction be issued in the form of a Headquarters Regulation approved by the DDCI. The purpose of the Headquarters Regulations is to ". . . prescribe policies and procedures essential to the control and direction of Agency activities." [REDACTED] STATINTL
Indeed, other Agency policies as essential as that contemplated by the recommendation are promulgated in this manner, e.g., "Restrictions on Intelligence Activities," [REDACTED] STATINTL

The recommended course for implementing the preferred option could help establish an unfortunate precedent -- the Headquarters Regulations become of questionable value since the truly important policy statements and instructions are contained in DCI/DDCI memoranda. Thus, the adoption of this recommendation could actually prove to be counterproductive.

REMAINING TABS -- GENERAL COMMENTS

The remaining tabs focus more specifically on particular personnel practices, policies or procedures. The Project Group recommendations primarily address policy questions (i.e., should career panels have the power to select candidates for promotion or be only advisors) rather than potential legal issues. An examination of each of the Tabs has not disclosed any recommendation which would be legally objectionable if adopted. Implementation of the recommendations may require greater attention to insure that necessary regulatory changes are legally sufficient and consistent with Agency authorities. STATINTL STATINTL

[REDACTED]
Daniel B. Silver